No. 92-1639

IN THE

Supreme Court of the United States

October Term, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in interpreting Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), the Court of Appeals misapplied principles of statutory construction clearly enunciated by this Court, and thus impermissibly substituted its own subjective judgment for that of the Congress and the U.S. Environmental Protection Agency, *viz.*, that no reasonable construction of Section 3001(i) could support the conclusion that ash produced at resource recovery facilities is exempt from hazardous waste regulation.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center, based in Washington, D.C. with over 100,000 members and supporters nationwide. WLF regularly apears before this Court and other federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government, especially in the area of environmental law. *See, e.g., Gade v. National Solid Wastes Management Ass'n*, 112 S.Ct. 2374 (1992); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2887 (1992); WLF's Legal Studies Division also publishes monographs and other publications on these topics.

The Allied Educational Foundation ("AEF") is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy, and has appeared with WLF as *amicus curiae* in numerous cases before this and other courts.

Both *amici* believe that courts should not substitute their value judgments for those of our elected leaders and government officials, and argue in this brief that the lower court in this case seriously violated fundamental principles of statutory interpretation. *Amici* bring a broader perspective to this case than the one presented by the parties, and believe that their brief will assist the Court in properly resolving this case. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

This case is before the Court for the second time. In the first rendition to reach the Court, the United States Court of Appeals for the Seventh Circuit (the "Court of Appeals") concluded, in a two-to-one decision, that the household waste exclusion in Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i), did not apply to ash produced during the incineration of municipal solid waste. *Environmental Defense Fund v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991) ("*EDF v. Chicago I*").[1] According to the Court of

[1] Section 3001(i) of RCRA reads as follows:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if --
>
> (1) such facility --
>
> (A) receives and burns only --
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential (continued...)

Appeals, the law required the ash to be managed and disposed of under the most stringent requirements of RCRA, *i.e.*, Subtitle C. *Id.* at 352.

To reach this conclusion, the Court of Appeals referred to traditional rules of statutory construction but found "a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency." *Id.* at 350. The contemporaneous legislative history was found to be "foggy" by reason of post-enactment letters, issued years afterwards by six members of Congress who took issue with what the legislative history said. *Id.* at 347-49. The administrative agency's "waffling" was found in preambles to implementing regulations and testimony of government officials at Congressional hearings, all portrayed as far more equivocal than in fact they are. *Id.* at 348, 349-50.

Thus, having determined that it faced an ambiguous statute, "foggy" legislative history, and "waffling" agency interpretations, the Court of Appeals abandoned traditional rules of construction and gave no weight to the legislative history and no deference, slight or otherwise, to the Agency interpretation. *Id.* at 350-51. Instead, the Court of Appeals took a "holistic" or contextual approach to the issue and assigned a meaning to the provision that it

[1] (...continued)

> sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i).

concluded could be the only one Congress intended in light of the statute's overall purpose. *Id.* at 351-52.

This Court granted certiorari and vacated the Court of Appeals' judgment. *Environmental Defense Fund v. City of Chicago*, 113 S. Ct. 486 (1992). It remanded the case to the Court of Appeals for reconsideration in light of a post-judgment memorandum issued by the Administrator of the U.S. Environmental Protection Agency ("EPA"). *See* Memorandum from W. Reilly to Regional Administrators regarding "Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation under RCRA Section 3001(i)" (Sept. 18, 1992) (the "Reilly Memorandum"). In that memorandum, EPA's Administrator construed the household waste exemption in Section 3001(i) to include ash from the incineration of municipal solid waste. The Administrator's interpretation thus was in conflict with the construction adopted by the Court of Appeals. *See Environmental Defense Fund v. City of Chicago*, 985 F.2d 303, 304 (7th Cir. 1993) ("*EDF v. Chicago II*").

Upon reconsideration, the Court of Appeals, again in a two-to-one decision, held that the Administrator's memorandum did not affect its opinion or judgment in the case. *Id.* at 304. As in its prior opinion, the Court of Appeals concluded that, because EPA "has changed its view so often," its interpretation was not entitled to any deference. *Id.*

This Court again granted certiorari. *Environmental Defense Fund v. City of Chicago*, 125 L. Ed. 2d 687 (1993).

SUMMARY OF ARGUMENT

It is undisputed that the judiciary is charged with the interpretation of statutes. The performance of this task, however, is not unfettered. Courts are bounded by rules of construction that are designed to elicit the statutory interpretation that best embodies the intention of its

drafters. Those longstanding and well-defined rules of construction were not followed faithfully in this instance. On the contrary, seizing upon recent admonitions from this Court not to rely excessively on legislative history, and refusing relentlessly to give even the slightest deference to the administrative agency's views, the lower court inappropriately jettisoned customary rules of statutory interpretation.

1. The starting point in statutory construction is the plain language of the statute itself. If the plain language of a statute, standing alone, fails to resolve the question of statutory interpretation, the reviewing court must turn to secondary sources to determine intent. The most prominent secondary source is legislative history.

Here, the Court of Appeals only briefly and selectively reviewed the legislative history of Section 3001(i) and then, based on letters from legislators dated three years after the statute's enactment, concluded that the legislative history failed to provide any guidance. The Court of Appeals did not examine the development of the relevant section, ignored several statements in relevant Committee Reports, except to conclude that the use of the word "generation" in one report was irrelevant, and failed to explore whether the placement of Section 3001(i) within the overall scheme of the Act bore any significance to its interpretation. In the end, the Court of Appeals erroneously failed to give any weight in its statutory analysis to legislative history.

2. When the language of the statute and its legislative history do not conclusively resolve a question of statutory interpretation, considerable deference is to be given to a reasonable interpretation by the administrative agency responsible for administering the statute. Even if an agency has reversed or modified its position, its views are nonetheless entitled to some deference. When a revision of an agency interpretation is justified by reasoned analysis, the level of deference required from a court is not reduced.

The Court of Appeals erroneously concluded that prior EPA statements amounted to "see-sawing" and therefore "deserved no weight at all." On remand, the Court of Appeals wrongly rejected an EPA memorandum containing an express and detailed agency analysis of Section 3001(i) as but "one more change of position." Thus, the Court of Appeals erroneously failed to give any deference whatsoever to EPA's reasonable and permissible interpretation of Section 3001(i).

3. After rejecting a reasonable construction of Section 3001(i) to the effect that ash generated by burning municipal solid waste at resource recovery facilities is exempt from hazardous waste regulation, and dismissing both the legislative history and reasoned agency interpretation which confirm that reading, the Court of Appeals found itself free to substitute its own judgment of the proper interpretation of Section 3001(i). It concluded that its interpretation was the only reasonable construction of Section 3001(i) consistent with the overall policy of RCRA.

In identifying that policy, however, the Court of Appeals neglected to consider equally valid and unambiguous statements of Congressional policy that conflicted with its interpretation of the statute. Even assuming the Court of Appeals accurately assessed the weight to be given the legislative history and EPA's interpretation of Section 3001(i), in substituting its judgment for that of the Congress and the Agency, it was not free to dismiss out of hand relevant, unambiguous and equally valid considerations that happened to conflict with its view. Not only is the reading it chose inconsistent with the provision itself, it runs counter to important considerations of policy that underlie the statute as a whole.

In each of the three foregoing respects, the judgment of the Court of Appeals is in error.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO IDENTIFY PROPERLY AND GIVE APPROPRIATE WEIGHT TO RELEVANT LEGISLATIVE HISTORY

A. The Court of Appeals Inappropriately Accorded Equal Weight to Post-Enactment Statements and Contemporaneous Legislative History in Its Analysis of the Statute

The function of the courts in interpreting a statute is easily stated: to give effect to the intent of Congress. *United States v. American Trucking Ass'n*, 310 U.S. 534, 542 (1940). The most persuasive evidence of that intent is the plain language of the statute itself. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). Where the plain language of a statute does not resolve a question of its interpretation, however, this Court has routinely turned to legislative history as the principal source for determining what Congress meant. *Train v. Colorado Pub. Interest Res. Group*, 426 U.S. 1, 9-23 (1976). *See also Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("[w]here, as here, resolution of a question of federal law turns on a statute and intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear").[2]

In the present case, instead of closely analyzing the legislative history and the structure of the statute, the Court of Appeals concluded, on the basis of letters from members of Congress dated three years after passage of the amendments, that *none* of the legislative history of Section 3001(i) was sufficiently explicit to shed light on

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[2] Even where the plain language appears to resolve the question of its interpretation, the Court typically refers to the legislative history to confirm the presumption that Congress expresses its intent through the language it chooses. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

the meaning of the provision. *See EDF v. Chicago I*, 948 F.2d at 348-49. Thus, no weight at all was accorded to the legislative history in the Court of Appeal's analysis. *Id.* at 351.

Post facto statements of intent by lawmakers, like the letters reviewed by the Court of Appeals, are not legislative history and it has long been recognized that such statements are not reliable sources of legislative intent. *See, e.g., United States v. Clark*, 445 U.S. 23, 33 n.9 (1979); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *United States v. Wise*, 370 U.S. 405, 411 & 414 (1962) (how members of a subsequent Congress may interpret a prior-enacted act has no weight for the purpose of construing that act). Indeed, the Court of Appeals here admitted that such statements "bear no necessary relationship to the forces at work at the time of enactment." *EDF v. Chicago I*, 948 F.2d at 351. Nevertheless, the Court of Appeals dismissed all the contemporaneous legislative history as "foggy" based on these letters.

This failure to meaningfully consider relevant legislative history clearly is a misapplication of the principles of statutory interpretation developed by this Court. *See Train v. Colorado Pub. Interest Res. Group*, 421 U.S. at 9-10 ("[t]o the extent that the Court of Appeals excluded reference to the legislative history of the [act] in discerning its meaning, the Court was in error"). Moreover, unburdened by extraneous post-enactment statements, the legislative history shows that the lower court erred when it failed to find that Congress intended Section 3001(i) to exempt ash from Subtitle C regulation.[3]

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[3] In deciding not to accord any weight to Section 3001(i)'s legislative history, the Court of Appeals argues that recent opinions of this Court evidence a conviction that "recourse to legislative history to clarify the meaning of statutory language is, at best, a shaky endeavor." *EDF v. Chicago I*, 948 F.2d at 350. To support this position the Court of Appeals cites a snippet of Justice Scalia's (continued...)

B. The Legislative History Demonstrates that Congress Intended to Exempt Ash Generated by the Burning of Municipal Solid Waste at Resource Recovery Facilities from Hazardous Waste Regulation

1. The Senate and Conference Reports Evidence an Intent to Create an Exemption

The House of Representatives did not include in its version of the Hazardous and Solid Waste Amendments of 1984 any provision regarding the household waste exclusion. H.R. Conf. Rep. No. 1133, 98th Cong., 1st Sess. 106 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5677. The bill as passed by the Senate, however, included the language now found in Section 3001(i). *See id.* Thus, the Senate Committee reports addressing the provision in the Senate bill, and the Conference Committee's report explaining the decision to accept the Senate's version, are relevant sources for determining what Congress intended Section 3001(i) to mean. *See Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986) ("[t]he authoritative source for legislative intent lies in the Committee reports on the bill"). The Conference Committee report is normally entitled to considerable weight. *See National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 832 n.28 (1983).

The Conferees adopted the version of Section 3001(i) contained in the Senate bill without change. The

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[3] (...continued)
concurrence in *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989), but fails to put this quotation in context. In *Blanchard*, Justice Scalia's primary concern was that courts will achieve mindless "obedien[ce] to cases cited in . . . committee reports" rather than interpret a statute consistent with its purpose. *Blanchard v. Bergeron*, 489 U.S. at 948. Nowhere in *Blanchard* does Justice Scalia suggest that it is appropriate to disregard completely a committee report and a conference report when faced with an ambiguous statutory provision.

Conference Report uses extremely broad language in describing the scope of Section 3001(i)'s household waste exclusion:

> The Senate amendment clarifies that *an energy recovery facility is exempt from hazardous waste requirements* if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility.

H.R. Conf. Rep. No. 1133, 98th Cong., 1st Sess. 106 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5677 (emphasis added). This language unambiguously implies that Congress intended to exempt energy recovery facilities from *all* RCRA hazardous waste requirements, provided certain specific conditions are met. No statements to the contrary appear in the Conference Report or in colloquy on the floor of either house of Congress during consideration of the Conference Report.

Similarly, the Report of the Senate Committee on Environment and Public Works contains expansive language regarding the household waste exclusion. The Committee "clarified" the scope of the household waste exclusion:

> New section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion *activities* of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.
>
> *All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . .*

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added). This explanation, by referring broadly, and without specificity, to "all waste management activities" of a resource recovery facility contains no indication that the exclusion was limited only to activities occurring before incineration.

2. *The History and Development of the Provision Evidences an Intent to Create an Exemption*

The intent evident in the Committee Reports is further demonstrated by the fact that enactment of Section 3001(i) in 1984 occurred after the promulgation in 1980 of EPA's regulations regarding the household waste exclusion. The preamble to the 1980 regulations clearly states EPA's express policy that ash was exempt from regulation as hazardous waste. *See* 45 Fed. Reg. 33084, 33098-99 (May 19, 1980) ("[s]ince household waste is excluded in all phases of its management, residues remaining after treatment (*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste"). Thus, as of 1984, Congress had to have been well aware of EPA's interpretation that an exemption for ash existed. *See Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325 (1990) (Congress is presumed to be aware of existing law when it passes legislation), *citing Cannon v. University of Chicago*, 99 S. Ct. 1946, 1957 (1979). Yet, neither the Senate Committee Report nor the Conference Report contain language indicating that Congress intended to depart from the policy in effect at that time.

Had Congress intended to reverse the clearly stated rule in the EPA 1980 preamble, it surely would have noted the change when adding the household waste exclusion to the text of RCRA in 1984. *Accord Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992) ("this Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change . . . that is not the subject of at least some discussion in the legislative history")

(citations omitted). Likewise, had the Senate meant to limit the exclusion in any way, it would have used a more specific phrase than "all waste management activities" to describe the scope of coverage. *See* S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983).[4]

3. *Clear Expressions of Statutory Policy Regarding Resource Recovery Evidences an Intent to Create an Exemption*

The Senate Report to the household waste exclusion contains the broad policy statement that: "It is important to encourage commercially viable resource recovery facilities and to *remove impediments that may hinder their development and operation.*" S. Rep. No. 284, 98th Cong., 1st Sess., at 61 (emphasis added). In 1984, when it expressed this policy, Congress had to have been cognizant of the disparate economic and other burdens of compliance that flow directly from the classification of a waste as "hazardous waste" requiring management under Subtitle C of RCRA, as opposed merely to "solid waste" entitled to management under Subtitle D.

From subtitle to subtitle, RCRA in its entirety is organized in descending measures of strictness, administrative burden, detail and cost. It thus is inconceivable that Congress would have made a policy statement strongly promoting the development and economically viable operation of resource recovery facilities while, at the same time, expecting its intent to be

[4] Under EPA's 1980 policy, household waste streams were exempt from regulation as hazardous waste. *See* 50 Fed. Reg. 33099. Household waste streams included waste generated by consumers at the household level and waste generated at hotels and motels. *See id.* When Congress amended RCRA in 1984, it expanded the household waste exclusion to include nonhazardous commercial and industrial waste. *See* 42 U.S.C. § 6921(i). Apparently, in codifying the exclusion in 1984, Congress did not intend to restrict the scope of EPA's policy but rather sought to expand its protections to other waste streams.

clear, without mentioning it directly, that ash generated by resource recovery facilities would be subject to full hazardous waste regulation.

As argued in more detail in the briefs of Petitioner and the other *amici*, the financial burdens that would be imposed upon resource recovery facilities if ash generated by burning municipal solid waste were subject to hazardous waste regulation would be enormous. It is hardly consistent with a policy of promoting the economically viable operation of resource recovery facilities to increase their ash disposal costs from $42 to $453 per ton, subject them to significantly more onerous and expensive regulations relating to its storage and transportation, and impose upon their owners and operators the extra burden of extensive and costly administrative compliance obligations.[5] It is unlikely that a Congress able to express its direct and explicit support for resource recovery facilities would have allowed its policy to be eroded by implication.

4. *Placement of the Provision within the Overall Scheme of the Act Evidences an Intent to Create an Exemption*

The placement of the household waste exclusion within the overall scheme of the RCRA also lends considerable support to the conclusion that Congress intended to create a broad exemption covering ash. The provision at issue appears at subsection (i) of Section 3001. 42 U.S.C. at § 6921(i). Section 3001 is devoted to threshold jurisdictional issues -- the identification and listing of hazardous wastes. *Id.* If a waste is identified as hazardous, a variety of regulatory consequences follow under Subtitle C. If it is not, it is exempt from such treatment. Section 3004 of RCRA, by contrast, specifically concerns rules and regulations applicable to owners and operators of facilities that store, treat and

[5] *See* Reilly Memorandum at 6-7.

dispose of hazardous waste. 42 U.S.C. at § 6924. Had Congress, as the Court of Appeals concluded, intended narrowly to exempt resource recovery facilities only from the regulations governing treatment, storage and disposal facilities, surely it would have placed the provisions now in subsection (i) in Section 3004, where those rules are delineated, and not in Section 3001, which deals with the issue of whether any aspect of Subtitle C of RCRA is triggered at all.

5. The Use of the Word "Generation" in the Senate Report Evidences an Intent to Create an Exemption

The word "generation" was used in the Senate Committee's explanation of Section 3001(i). *See, supra,* p. 10. The use of this word demonstrates that, as understood by the Committee, the household waste exclusion creates an exemption for ash generated by the incineration of municipal solid waste. The Court of Appeals declined to grant any significance to the use of this word, stating that it was "tossed around," did not appear in the final bill, and was only a single word. *EDF v. Chicago I*, 948 F.2d at 351.

The very significance of its use in the Senate Report, however, is underscored by the fact that the word "generation" did not appear in the bill considered and marked up by the Senate Committee. Nevertheless, as the Committee Report shows, the Senate Committee clearly believed the act of "generating" ash was covered by the words already in the bill. At no point did the Senate, or its Committee, believe it necessary to insert the word "generation" expressly into the bill in order to forestall the possibility that the provision would be perceived to contain an ambiguity.

The Court of Appeals implicitly assumed that the absence of the word from the statute resulted either from a lack of seriousness, *id.* at 351 ("tossed around"), or from the rough and tumble of Conference Committee

haggling, *id.* at 351. But, "[t]his Court generally is reluctant to draw [such] inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). Indeed, it is equally if not more plausible that the Senate believed the terms of the provision which delineated the activities to be covered by the exemption were sufficiently broad to encompass its intention that acts of "generation" be included in their coverage. *Accord id.* at 306 (failure to adopt an explicit amendment is not reliable evidence that Congress did not address the matter, since it is equally plausible that the amendment was not adopted because Congress believed the legislation already covered the matter).

The issue is whether any of the terms set forth in Section 3001(i) are sufficiently broad to cover "generation." The Senate Report makes it clear that the Senate thought it did. The Senate Report is the only contemporaneous source of legislative history that directly interprets the language in Section 3001(i). No other source of legislative history even discusses the language at issue, let alone adopts a view contrary to that of the Senate's. The Senate interpretation never varied during Committee consideration of the Senate bill. No Senator took a contrary position during debate in the Senate. The Senate bill was acceded to by the House without dissent of any kind on the scope of the exemption language inserted into the Conference Report or spoken during debate. Most importantly, as shown above, the interpretation in the Senate Committee Report is both consistent with and supported by other relevant facets of the legislative history.[6] To characterize the Senate view as no more than the mere "tossing around" of a single word is misleading; surely, in the absence of some contradictory expression, the Senate's view is entitled to substantial weight.

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[6] For further detailed discussion of the legislative history of RCRA, the 1984 Hazardous and Solid Waste Amendments and Section 3001(i), *see* Brief of the Petitioners, Section I.C; and Brief of Wheelabrator Technologies, Inc., *et al.* as *Amici Curiae* in Support of Petitioners, Section I.C.

II. THE COURT OF APPEALS ERRED IN FAILING TO GRANT ANY DEFERENCE WHATSOEVER TO EPA'S STATEMENTS INTERPRETING SECTION 3001(i)

When a statute and its legislative history fail to address a question explicitly, well-settled rules of statutory construction require a reviewing court to defer to a reasonable interpretation of the administrative agency responsible for administering the statute, even if it is not the interpretation the Court would necessarily favor. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984); *National RR Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1401 (1992); *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2161 (1993). In *EDF v. Chicago I*, however, after pronouncing the statute ambiguous and the legislative history foggy, the Court of Appeals concluded that the EPA had changed its views so often it was not entitled to deference. *See EDF v. Chicago I*, 948 F.2d at 350. On remand, the Court of Appeals again rejected an agency analysis as nothing more than another change of position. *See EDF v. Chicago II*, 985 F.2d at 304 (discussing the Reilly Memorandum).

In each instance, the Court of Appeals misconstrued the import and substance of the relevant EPA interpretations and failed to grant proper deference to the applicable EPA interpretation as the rules of this Court require. The purported agency "waffling" hardly amounted to the kind of "sharp break with the past" that could warrant the discounting of an agency's view. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991). Moreover, even if it can be said that the EPA changed its position, its current view, based as it is on reasoned analysis, is nonetheless entitled to deference.

A. The Court of Appeals Misconstrued the Substance and Import of the Agency Interpretations It Rejected as Agency Waffling

Prior to enactment of Section 3001(i), EPA clearly viewed the household waste exclusion as exempting combustion ash. *See supra*, p. 11. This view is expressly stated in the preamble to the regulations that first adopted the household waste exclusion. *See id.*

The Court of Appeals concluded, however, that EPA revised that position following the enactment of Section 3001(i). *EDF v. Chicago I*, 948 F.2d at 348. The Court based this finding on agency statements in the preamble to 1985 regulations promulgated to implement Section 3001(i) and other 1984 amendments. The preamble to the 1985 regulations states EPA's view that:

> [t]he statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate Report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith effort to avoid such a

> result, from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste. However, EPA has no evidence to indicate that these ash residues are hazardous under existing rules.

50 Fed. Reg. 28702, 28725-26 (July 15, 1985). EPA went on to state that:

> EPA does not believe the HSWA impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. *Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.*

Id. (emphasis added).

Although the foregoing statement nowhere adopts a definitive interpretation of Section 3001(i), which the Court of Appeals acknowledged, it was nevertheless characterized by the Court as a reversal of the Agency's prior definitive statement excluding ash. *EDF v. Chicago I*, 948 F.2d at 348. As the language quoted above shows, however, EPA's 1985 statements are ambiguous. At most, they acknowledge that the issue of whether ash should remain exempt under Section 3001(i) must await

future consideration of conflicting policy and technical issues.

The Court of Appeals also cites two instances involving testimony by EPA officials at Congressional committee hearings to conclude that the Agency had waffled. *EDF v. Chicago I*, at 349-50. These snippets of testimony suggest that EPA's thinking on the scope of the household waste exclusion may have been modified somewhat over the years. They do not, however, constitute definitive positions, supported by thorough and reasoned analysis of the issues. At most, they constitute bureaucrats thinking fast on their feet about an issue that still awaited resolution by the Agency.

EPA's administrative record is likewise devoid of any continuous issuance and retraction of rules, regulations or other binding requirements on the regulated community concerning the scope of Section 3001. Rather, the thorough Agency consideration of the issue foreshadowed by EPA in its 1985 statement is contained in the Reilly Memorandum that was issued in 1992. Yet, the Court of Appeals dismissed this formal, definitive and explicit policy analysis of the issue as nothing more than another change of the Agency's position.

In sum, none of the examples of Agency waffling cited by the Court of Appeals amount to the kind of flip-flopping upon which deference to agency views by a Court may legitimately be denied. *Compare Immigration & Naturalization Servs. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221, n.30 (1987) (alternative basis for rejecting Agency's position where the Agency in formal adjudicatory decisions interpreted statutory provision "in at least three different ways"). Rather, the facts in this case suggest that the Court of Appeals erred when it refused to accord any deference to the Agency's position solely because that position had been evolving in the years since the enactment of Section 3001(i).

B. Even Assuming That the Agency's Views Have Changed over Time, the Court of Appeals Erroneously Failed to Give Proper Deference to the Reilly Memorandum

Even if an agency's views have changed over time, where its construction of a statute is reasonable and not in direct conflict with the object and policies of the statute, its opinion should be accorded deference. *See Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161 (where an agency's interpretation of a statute is "at least as plausible" as competing ones, courts should defer to the agency's view notwithstanding that it is a break with a previous position). This is especially the case where revisions to an agency interpretation are justified by the agency's thorough and reasoned analysis. *See Rust v. Sullivan*, 111 S. Ct. 1769 (1991). *See also Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 863. When the agency's current view closely fits the design of a statute as a whole and is not inconsistent with its object and policy, it should be accorded deference. *See Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161.[7]

Here, EPA's first comprehensive and definitive policy analysis to adopt an explicit position on the scope of Section 3001(i) states that ash is within the household waste exclusion. *See* Reilly Memorandum at 1. The Agency justifies this position in a thorough analysis of the law and policies underlying it. *See id.* at 2-7. To the extent there has been waffling in the past, it has not been nearly as equivocal as the Court of Appeals suggests, and does not warrant a blanket rejection of the Agency's current position. Indeed, as shown above, and in the Reilly Memorandum, the EPA's current view "closely fits

[7] In contrast, courts must reject an administrative construction of a statute that is inconsistent with the statutory mandate or frustrates the policy that Congress sought to implement. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

'the design of the statute as a whole and . . . its object and policy.'" *Good Samaritan Hospital v. Shalala*, 113 S. Ct. at 2161 (citation omitted). The Agency view was at least entitled to some deference, and the Court of Appeals erred when it failed to give it any deference at all.

III. A CONTEXTUAL ANALYSIS OF SECTION 3001(i) EQUALLY SUPPORTS THE REASONABLENESS OF A CONSTRUCTION THAT ASH INDEED IS EXEMPT FROM HAZARDOUS WASTE REGULATION

The Court of Appeals noted that Congress intended to promote proper disposal of dangerous substances that otherwise would seep into the ground and water table. *EDF v. Chicago I*, 948 F.2d at 351-52. It concluded, therefore, that the only construction of Section 3001(i) that could be consistent with this underlying policy is one requiring ash from the burning of municipal waste to be subject to full hazardous waste regulation under Subtitle C of RCRA. *Id.* ("[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills").[8] Assuming its conclusions, the Court of Appeals suggests that since any construction of the provision other than its own would be absurd, its construction must represent the "plain meaning" of Section 3001(i). *Id.*

In identifying the relevant policy, however, the Court of Appeals neglected to consider equally valid, clear and unambiguous statements of Congressional policy

[8] The Court of Appeals seemed not to appreciate that so-called "ordinary landfills" also must meet certain minimum regulatory requirements under Subtitle D of RCRA and regulations enacted by EPA. *See, e.g.*, 40 C.F.R. pt. 258. These include installation of liners, leachate collection, groundwater monitoring and post-closure care. *Id.*

underlying RCRA and Section 3001(i) itself. Even assuming the Court of Appeals accurately assessed the weight to be given the legislative history and EPA's interpretation of Section 3001(i), in substituting its judgment for that of the Congress and the Agency, it was not free to dismiss out of hand plainly relevant but conflicting factors in reaching to justify its own interpretation.

A. An Exemption for Ash from Resource Recovery Facilities is Consistent with Congressional Policy to Promote Commercially Viable Resource Recovery Facilities

As a matter of environmental policy, resource recovery is one important means of mitigating the clear and present solid waste crisis in the United States.[9] To the extent municipal solid waste can safely be incinerated instead of disposed in landfills, the problems of lack of landfill space and the huge administrative and financial costs currently burdening States and municipalities will be at least partially alleviated.[10] To the extent incineration

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[9] *See* Statement of Lee M. Thomas, Administrator of the U.S. Environmental Protection Agency, before the Subcommittee on Transportation Tourism and Hazardous Materials of the House Committee on Energy and Commerce, at 2 (April 13, 1988) ("municipal waste combustion, preferably with energy recovery, will be needed to reduce the massive [solid waste] volumes further in many urban areas"). It also has been estimated that the promotion of resource recovery and other waste-to-energy facilities can reduce the volume of refuse by up to 90 percent, and thereby extend the lives of many landfills. *See generally* "Resource Recovery in the United States," National Solid Wastes Management Association, at 3 (Sept. 1, 1979), *citing* U.S. Environmental Protection Agency, *Municipal Solid Waste Landfill Survey* (1986). *See also* Reilly Memorandum at 6.

[10] Combustion of municipal solid waste had increased to 32 million tons, or roughly 16 per cent of generation, in 1990. All major new combustion facilities have energy recovery and are designed to meet air pollution standards. About 35 million tons of municipal solid waste will be combusted in 1995, and 46 million tons will be combusted in (continued...)

takes place in combination with energy recovery, production of electricity also can only become less wasteful, more efficient, and less costly. *See generally* 42 U.S.C. at §§ 6901(d), 6902(a)(11), 6941(a)(2). Moreover, ancillary costs, such as the loss of revenue from potentially productive land reserved for landfill space, also may be minimized.

These potential benefits of resource recovery are consistent with the policy statement in the Senate Committee Report that commercially viable resource recovery facilities should be promoted under the Act and impediments to their operation removed. *See* S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). They also are consistent with the overall objective of RCRA which, in addition to creating a cradle-to-grave system for hazardous wastes, was enacted to "maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation." *See* 42 U.S.C. § 6941; *see also* 42 U.S.C. § 6941a(3) (recovery of energy from municipal waste can have the effect of reducing the volume of the municipal waste stream and the burden of disposing increasing volumes of solid waste). It is evident, therefore, that it would neither be absurd nor incompatible with underlying policy to construe Section 3001(i) as conferring an exemption for ash generated by resource recovery facilities.

The interpretation of the meaning of statutes, as applied to cases and controversies, is exclusively a judicial function. *See United States v. American Trucking Ass'n*, 310 U.S. at 542. This Court has cautioned, however, that:

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[10] (...continued)
2000. *See* U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, at ES-9-10 (July 1992).

> [t]his duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously, there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body.

Id. at 544. *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 866 ("federal judges - who have no constituency - have a duty to respect the legitimate policy choices made by those who do"). The Court of Appeals erred when it substituted its own interpretation of the meaning of Section 3001(i) of RCRA without even addressing, let alone explaining, its decision to ignore a manifestly reasonable, contradictory interpretation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to reverse the judgment of the Court of Appeals and find that Section 3001(i) excludes ash from regulation under Subtitle C of RCRA.

Respectfully submitted,

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